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Safeguards Corp Sdn Bhd (formerly known as Safeguards Corp Bhd) v Rampai Town Centre Sdn Bhd

B

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D8–24–26 OF 2008
KANG HWEE GEE J
12 JUNE 2008

C

Civil Procedure — Injunction — Application for — Fortuna injunction — Governing principles — Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation

D

Companies and Corporations — Winding up — Injunction to restrain petition — Application for Fortuna injunction — Debt claimed on statutory notice disputed on substatial grounds — Whether abuse of the court's process if petition granted — Whether irreparable damage suffered — Companies Act 1965 s 218(1)(e)

E

This was the plaintiff's application for a Fortuna injunction to restrain the defendant from filing a winding up petition under s 218(1)(e) of the Companies Act 1965 upon the service of the statutory notice. The defendant had a contractual duty to the plaintiff to maintain a building. The plaintiff claimed that there was a fundamental breach of contract which caused the plaintiff to suffer extensive damage to the premises concerned and subsequent losses due to the defendant's failure to provide proper service and maintenance. Hence, the purported debt claimed by the defendant against the plaintiff arose for services allegedly provided by the defendant in respect of maintenance of the building belonging to the plaintiff. The plaintiff submitted that the defendant's claim must first be tried at the civil court. The defendant in reply submitted that if the injunction was granted the plaintiff would continue to enjoy the services rendered by the defendant without having to pay.

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Held, allowing the plaintiff's application with costs:

(1) The judgment in *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* [1978] VR 83 is not so easily understood in so far as it can be applied to provide a definite test of whether an injunction may issue.

It appears to be grounded on the primary consideration of whether the intended presentation would constitute an abuse of the process of the court, in two situations, ie if it is clear that the petition if presented would have no chance of success; and if it is clear that the petitioner would be presenting a petition on a debt which is disputed on substantial grounds (see paras 6–7).

(2) A court hearing a petition to wind up a company on account of its inability to pay its debt assumes that the judgment creditor's claim is for the purpose of the petition undisputed to be able to proceed with the petition. The authorities are clear — the court will not adjudicate on the merit of the defendant's claim at the hearing of the petition as it would in a trial on the claim proper and will therefore dismiss the petition (see para 9).

(3) The plaintiff had disputed the claim as it had, in fact, already filed a claim against the defendant for breach of contract at the sessions court. The debt that the defendant claimed on the statutory notice was therefore a debt that was disputed on substantial grounds. Should the defendant proceed nevertheless to present the petition, it would be an abuse of the process of the court and the plaintiff would be put to suffer irreparable damage. Hence, an injunction shall be issued to restrain the defendant from presenting the petition (see paras 10–11).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif untuk injunksi Fortuna bagi menghalang defendan daripada memfailkan petisyen penggulungan di bawah s 218(1)(e) Akta Syarikat 1965 selepas penyampaian notis statutori. Defendan mempunyai kewajipan kontraktual kepada plaintif untuk menyelenggarakan sebuah bangunan. Plaintif mendakwa bahawa terdapat pelanggaran asas kontrak yang mengakibatkan plaintif mengalami kerosakan teruk terhadap premis berkaitan dan selanjutnya kerugian akibat kegagalan defendan memberikan perkhidmatan dan penyelenggaraan sewajarnya. Justeru itu, hutang yang bermaksud untuk dituntut oleh defendan terhadap plaintif timbul bagi perkhidmatan yang dikatakan telah diberikan oleh defendan berkaitan penyelenggaraan bangunan milik plaintif. Plaintif menghujahkan bahawa tuntutan defendan patut dibicarakan terlebih dahulu di mahkamah sivil. Defendan menjawab bahawa jika injunksi diberikan plaintif akan terus menikmati perkhidmatan yang diberikan oleh defendan tanpa perlu membayar.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Penghakiman dalam kes *Fortuna Holdings Pty Ltd v The Deputy*

Commissioner of Taxation [1978] VR 83 sukar difahami setakat mana ia terpakai bagi memberikan ujian tepat sama ada injunksi boleh dikeluarkan. Ia kelihatan diasaskan atas pertimbangan utama tentang sama ada penyampaian yang diniatkan akan membentuk penyalahgunaan proses mahkamah, dalam dua keadaan, iaitu jika ia jelas bahawa petisyen itu jika disampaikan tidak akan berjaya; dan jika ia jelas bahawa pempetisyen akan menyampaikan petisyen terhadap hutang yang dipertikaikan atas alasan-alasan yang penting (lihat perenggan 6–7).

(2) Mahkamah yang mendengar petisyen untuk menggulungkan syarikat disebabkan ketidakupayaannya membayar hutangnya menganggap tuntutan pemiutang penghakiman adalah bagi tujuan petisyen yang tidak dipertikaikan itu boleh diteruskan dengan petisyen itu. Autoriti-autoriti adalah jelas — mahkamah tidak akan mengadili atas merit tuntutan defendan semasa pendengaran petisyen kerana ia akan dibicarakan atas tuntutan sewajarnya dan oleh itu akan menolak petisyen itu (lihat perenggan 9).

(3) Plaintif telah mempertikaikan tuntutan itu kerana ia telah, pada hakikatnya, memfailkan tuntutan terhadap defendan kerana pelanggaran kontrak di mahkamah sesyen. Hutang yang dituntut oleh defendan atas notis statutori oleh itu merupakan hutang yang dipertikaikan atas alasan-alasan yang penting. Jika defendan meneruskan untuk menyampaikan petisyen itu, ia merupakan penyalahgunaan proses mahkamah dan plaintif akan mengalami kerugian yang tidak boleh dipulihkan. Justeru itu, injunksi patut dikeluarkan untuk menghalang defendan daripada menyampaikan petisyen tersebut (lihat perenggan 10–11).]

Notes

For cases on application for injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2866–2888.

For cases on injunction to restrain petition, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1143–1161.

Cases referred to

Bryanston Finance Ltd v de Vires (No 2) [1976] Ch 63, CA (refd)

Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation [1978] VR 83 (refd)

Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316; [2001] 3 CLJ 295, CA (refd)

People Realty Sdn Bhd v Red Rock Construction Sdn Bhd [2008] 1 MLJ 453, CA (refd)

Legislation referred to
Companies Act 1965 ss 217(1), 218(1)(e)

Mohan (George Varghese with him) (Tajul Arafat & Associates) for the plaintiff. Sandosh Anandan (Sandosh Anandan) for the defendant.

Kang Hwee Gee J:

[1] This is an application by the plaintiff for a Fortuna injunction to restrain the defendant from filing a winding up petition under s 218(1)(e) of the Companies Act 1965 upon the service of the statutory notice.

[2] An ex parte order had been granted on 29 January 2008 against the defendant on an urgent basis and today's hearing is inter partes.

[3] The grounds are as follows: (verbatim submission by counsel for the plaintiff):

(1) The plaintiff is not a creditor as defined by s 217(1) of the Companies Act 1965. Section 217(1) reads as follows:

> 217 Application of winding up
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> (1) A company (whether or not it is being wound up voluntarily) may be wound up under an order of the Court on the petition of —
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> (a) the company;
>
> (b) any creditor, including a contingent or prospective creditor, of the company;
>
> (c) a contributory or any person who is the personal representative of a deceased contributory or the trustee in bankruptcy or the Official Assignee of the estate of a bankrupt contributory;
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> (d) the liquidator;
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> (e) the Minister pursuant to section 205 or on the ground specified in section 218(1)(d);
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> (f) in the case of a company which is a licensed institution, or a scheduled institution in respect of which the Minister charged with responsibility for finance has made an order under section 24(1) of the Banking and Financial Institutions Act 1989, or a non-scheduled institution in respect of which such Minister has made an order under section 93(1) of that Act, Bank Negara Malaysia;

(g) (Deleted by Act 372).

or of any two or more of those parties.

(2) The defendant does not have a valid and enforceable judgment against the plaintiff.

(3) The plaintiff denies owing the defendant the said sum which is disputed on substantial ground.

(4) The purported debt arose for services allegedly provided by the defendant to the plaintiff in respect of maintenance of a building belonging to the plaintiff. The defendant had a contractual duty under a contract between the plaintiff and the defendant to maintain this building. The plaintiff says that there was a fundamental breach of contract causing the plaintiff to suffer the extensive damage to the premises and subsequent losses due to amongst others leakage of the roof causing water to seep into the plaintiff's premises. There was also leakage of pipes causing water to enter the plaintiff's premises. There were also other breaches like frequent breakdown of lifts, dirty and unclean staircase and lobby area and graffiti on the walls of the building. There is therefore a dispute on the defendant's claim which must first be tried at the civil court.

(5) The plaintiff had in fact filed a claim against the defendant at the Kuala Lumpur Sessions Court vide Suit No 52–26059 of 2007 on the 23 August 2007 claiming for damages totaling RM98,881.80 against the defendant for the losses suffered by the plaintiff as a result of the defendant's breach.

REPLY BY COUNSEL FOR THE DEFENDANT (VERBATIM)

(1) The invoices issued by the defendant to the plaintiff are dated 1 January 2007 which are for various services. The first invoice being for service charges for the year 1 January 2007 till 31 December 2007 at the rate of RM5,945.40 totalling RM71,344.80. The second invoice is in respect of insurance premium for fire for the period of 25 January 2007 till 24 January 2008 totalling RM2,445.62 and the third invoice is in respect of quit rent apportioned for year 2007 totalling a sum of RM3,981.10. This was the basis of the notices pursuant to s 218 issued by the defendant to the plaintiff on 3 January 2008 which is one year after the issuance of the three invoices referred above.

(2) At the point of time of the issuance of the notices the plaintiff had not raised any objections to the notices save complaints written by the defendant via certain correspondences as listed in exh 'AS-8' in

affidavit in reply of Ahmad Shauki bin Said affirmed on 21 March 2008. The complaints raised are in respect of purported non-performance of services and breaches by the defendant. The plaintiff had prior to these notices issued even in 2006 where a complaint was lodged had paid the defendant for the services despite raising this complaint.

(3) It is our contention that the plaintiff's claim against the defendant in the Kuala Lumpur Sessions Court via Civil Action 52–26059 of 2007 is monetary in nature and is based on two incidents which occurred purportedly on 9 March 2007 and 4 June 2007 which has yet to be heard and determined by the Kuala Lumpur Sessions Court. We are of the view that the plaintiff cannot seek relief against the defendant on a basis of a monetary claim. See *People Realty Sdn Bhd v Red Rock Construction Sdn Bhd* [2008] 1 MLJ 453 per Nik Hashim JCA at p 458:

> [8]... Only on the hearing of the petition the court would be able to consider the cross claim and determine whether it should exercise its discretion to order winding up or not to order it. In the event the appellant is ordered to be wound up the cross claim can still be proceeded by the liquidator on behalf of the appellant under s 236(2) of the Act (*Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Ltd* [1997] 2 MLJ 756). Thus, to consider the cross claim, which is a separate issue altogether, before the hearing of the petition is premature and therefore, it should not be considered at that stage (see *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447).
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> [10]... We agree with the respondent that the cross-claim at this stage of the proceedings remains illusory and uncertain since it had still to go through the process of litigation before it could eventually graduate into a judgment (see *RHB Bank Bhd v Pembinaan MCP Sdn Bhd* [2002] MLJU 597). Even if there exists the cross-claim, the petition should not be struck out in limine should be heard on its merit (*Morgan Guaranty Trust Co New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95).

(4) At this point of time the plaintiff is the beneficiary owner of the 6th floor of the complex in which the defendant provides services to all tenants inclusive of the plaintiff. If the injunction is granted then in such a situation the plaintiff would continue to enjoy the services rendered by the defendant without having to pay.

FINDINGS AND DECISION

[4] The right to present a petition to wind up a company on the ground that it is unable to pay its debt is a statutory right under s 218(1)(e) of the

Companies Act 1965, and the court would not act to undermine that right unless it is clear that the petition is bound to fail under the very broad test of *Bryanston Finance Ltd v de Vires (No 2)* [1976] Ch 63.

[5] The Court of Appeal has since in *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316; [2001] 3 CLJ 295 refined the test by which an intended winding up petition may be restrained from presenting the petition by adopting *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* [1978] VR 83 where according to Gopal Sri Ram JCA the 'juridical basis for the relief was first explained'.

The principle is summarised by the editors of the CLJ in headnote (3) of the report as follows:

> (3) The kind injunction by which an intended winding up petition is sought to be restrained is known as 'Fortuna injunction'. The phrase takes its name from *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* where the juridical basis for the relief was first explained. *Fortuna Holdings* made it clear that the courts have established a principle that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of the process of the court. It was also clear that two distinct branches emanate from the principle — of which the first applies in cases where the presentation of the petition may produce irreparable damage to the company and where the proposed petition has no chance of success, and the second in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure (paras 5–7).

[6] The judgment in the *Fortuna* case is not easily understood in so far as it can be applied to provide a definite test of whether an injunction may issue. It appears to be grounded on the primary consideration of whether the intended presentation would constitute an abuse of the process of the court.

[7] It would constitute an abuse of process in two situations:

(i) if it is clear that the petition if presented would have no chance of success; and

(ii) if it is clear that the petitioner would be presenting a petition on a debt which is disputed on substantial grounds.

[8] Now, the defendant's claim on the statutory notice is based on its claim for payment for:

(i) the maintenance and service charges it provided to the plaintiff's premises for the period 1 January 2007 invoiced for sum of RM71,344.80;

(ii) the reimbursement of the fire insurance premium for the period 25 January 2007 to 24 January 2008 invoiced for the sum of RM2,445.62; and

(iii) the reimbursement of the apportioned quit rent on the part of the building owned by the plaintiff for the year 2007 invoiced for the sum of RM3,981.10.

[9] A court hearing a petition to wind up a company on account of its inability to pay its debt assumes that the judgment creditor's claim is for the purpose of the petition undisputed to be able to proceed with the petition. The authorities are clear — court will not adjudicate on the merit of the defendant's claim at the hearing of the petition as it would in a trial on the claim proper and will therefore dismiss the petition.

[10] Having heard the parties, it becomes clear to me that the plaintiff had disputed the claim on the ground that it was not liable to pay the maintenance and service charges in respect of the first invoice for the sum of RM71,344.80 on the ground that the defendant had committed a fundamental breach of contract in failing to provide the requisite service and maintenance thereby causing the plaintiff's premises to suffer extensive damages. It had in fact already filed a claim against the defendant for breach of contract at the sessions court. The debt that the defendant is now claiming on the statutory notice is therefore a debt which is disputed on substantial ground. Should the defendant proceed nevertheless to present a petition, it would be abusing the process of the court, for in doing so the plaintiff would be put to suffer irreparable damage.

[11] An injunction shall be issued to restrain the defendant from presenting the petition.

[12] The plaintiff's application is allowed with costs.

Plaintiff's application allowed with costs.

Reported by Ezatul Zuria Azhari